

No. 15971

---

In the United States Court of Appeals  
for the Ninth Circuit

---

WILSHIRE HOLDING CORPORATION, PETITIONER

*v.*

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

---

On Petition for Review of the Decision of the  
Tax Court of the United States

---

BRIEF FOR THE RESPONDENT

---

CHARLES K. RICE

*Assistant Attorney General*

LEE A. JACKSON

DAVID O. WALTER

*Attorneys*

*Department of Justice*

*Washington 25, D.C.*

---

FILED

AUG - 7 1958



## I N D E X

	Page
Opinion below .....	1
Jurisdiction .....	1
Question presented .....	2
Statute involved .....	2
Statement .....	3
Summary of argument.....	4
Argument:	
The Tax Court correctly interpreted the mandate and opinion of this Court in deciding that no part of the payments is deductible.....	4
Conclusion .....	8

## CITATIONS

### Cases:

<i>Commissioner v. Wilshire Holding Corp.</i> , 244 F. 2d 904, certiorari denied, 355 U.S. 815, rehear- ing denied, 355 U.S. 879.....	3, 4, 8
<i>Oesterrich v. Commissioner</i> , 226 F. 2d 798.....	3, 4

### Statute:

Internal Revenue Code of 1939, Sec. 23 (26 U.S.C. 1952 ed., Sec. 23).....	2
--	---



**In the United States Court of Appeals  
for the Ninth Circuit**

---

No. 15971

**WILSHIRE HOLDING CORPORATION, PETITIONER**

*v.*

**COMMISSIONER OF INTERNAL REVENUE, RESPONDENT**

---

**On Petition for Review of the Decision of the  
Tax Court of the United States**

---

**BRIEF FOR THE RESPONDENT**

---

**OPINION BELOW**

The memorandum on proposed computations for entry of decision under mandate of the Tax Court (R. 18-19) is not officially reported.

**JURISDICTION**

This petition for review (R. 20-22) involves federal declared value excess profits tax, excess profits tax, and income tax for 1945, and income tax for 1946. The total deficiencies amount to \$9,314.09. (R. 17.) This is the second petition for review of this case. The decision of the Tax Court, pursuant to the mandate of this Court, was entered on February 6,

1958. (R. 17-19.) The petition for review was filed on February 27, 1958. (R. 20-22.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

### QUESTION PRESENTED

Whether the Tax Court correctly construed the mandate and opinion of this Court in deciding that no part of the payments made by taxpayer to Walburga Oesterrich in 1945 and 1946 was deductible by taxpayer as rentals under Section 23(a)(1)(A) of the Internal Revenue Code of 1939.

### STATUTE INVOLVED

Internal Revenue Code of 1939:

#### SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a), [as amended by Sec. 121(a), Revenue Act of 1942, c. 619, 56 Stat. 798] *Expenses*.—

(1) *Trade or business expenses*.—

(A) *In General*.— \* \* \* rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity. \* \* \*

\* \* \* \*

(26 U.S.C. 1952 ed., Sec. 23.)



## STATEMENT

In 1929, taxpayer's predecessor entered into an agreement entitled a "lease" with Walburga Oesterrich, owner of a tract of land in Beverly Hills, California, providing for monthly payments, over a period of 67 years and eight months, with an option in the lessee to take title, upon payment of \$10, at the end of that time. The issue in this case is as to the proper treatment of those payments for the years 1945 and 1946.

In *Oesterrich v. Commissioner*, 226 F. 2d 798, this Court held that the agreement was not a lease, but a contract for the sale of land, and that, therefore, Mrs. Oesterrich was entitled to treat the payments as long term capital gains rather than as ordinary income. Correspondingly, in *Commissioner v. Wilshire Holding Corp.*, 244 F. 2d 904, rehearing denied, April 15, 1957, certiorari denied, 355 U.S. 815, rehearing denied, 355 U.S. 879, it summarily reversed the decision of the Tax Court that taxpayer was entitled to deduct the payments as rentals under Section 23 (a) (1) (A) of the Internal Revenue Code of 1939.

In the Tax Court the Commissioner moved for entry of decision pursuant to the mandate of this Court (R. 3), computing the deficiencies on the basis that no part of the payments was deductible. Taxpayer objected to this motion, on the ground that a part of the payments was deductible as rentals, relying on certain language in this Court's opinion in the *Oesterrich* case (R. 4-6), and subsequently filed alternative computations of tax liability (R. 6-11). After a hearing (R. 12-17) the Tax Court rejected

the taxpayer's proposed computations and accepted those of the Commissioner. (R. 17).

### SUMMARY OF ARGUMENT

The Tax Court is correct in stating that the taxpayer has taken the language of this Court in its *Oesterrich* opinion out of context and misconstrued it. A mere reading of this Court's opinion shows that it intended to hold that no part of the annual payments by taxpayer is deductible under Section 23 (a)(1)(A) of the Internal Revenue Code of 1939. Furthermore, taxpayer's argument in support of its contention that a portion of the payments is deductible has previously been presented to this Court in the earlier stages of the present *Wilshire Holding Corp.* case. Taxpayer is in effect trying to reopen the entire matter after the decisions of this Court in both cases have become final.

### ARGUMENT

#### **The Tax Court Correctly Interpreted The Mandate And Opinion Of This Court In Deciding That No Part Of The Payments Is Deductible.**

We submit that the Tax Court's decision was correct and that its memorandum correctly states (R. 19) that taxpayer has taken the language of this Court out of context and misconstrued it.

For convenience, we quote from the opinion of this Court in *Oesterrich v. Commissioner*,<sup>1</sup> 226 F. 2d 798, 801, 802:

---

<sup>1</sup> In *Commissioner v. Wilshire Holding Corp.*, 244 F. 2d 904, 805, this Court based its determination upon the previous determination "and opinion" in the *Oesterrich* case.



There is only one issue presented by this case. Is petitioner entitled to treat "rental" payments made by "lessee" as long term capital gains or must she treat them as ordinary income? Conversely, is lessee, the Wilshire Holding Corp., entitled to treat these payments as a deductible business expense as defined by Int. Rev. Code Sec. 23(a)(1)(A), 26 U.S.C.A. § 23(a)(1)(A) or merely as non-deductible capital expenditures? The sole issue, therefore, is whether the agreement is a lease or a contract for the sale of land.

\* \* \* \*

The question before us remains whether petitioner is entitled to treat her rental payments as long term capital gains rather than rental income and conversely whether Wilshire Holding Corporation is entitled to deduct the payment as rental expense as defined by Sec. 23(a)(1)(A)

\* \* \* :

\* \* \* \*

The Court then quoted the language of Section 23(a)(1)(A) that to be deductible the rentals or other payments must be for the use of property to which the taxpayer has not taken "or is not taking title or in which he has no equity" and stated (p. 802) that—

these two provisions of Sec. 23(a)(1)(A) are stated in the alternative and the deduction cannot be availed of if Wilshire Holding Corporation has brought itself into either category prohibited by statute.

As to the first, the opinion states (p. 802):

There can be no doubt that Wilshire Holding Corporation is acquiring title to the premises.

The opinion subsequently discusses the second alternative (p. 803):

The alternative criterion under Sec. 23(a)(1)(A) which would prevent Wilshire Holding Corporation from treating the payments as a business expense is whether an equity in the property was acquired.

In the discussion of this alternative appears the language on which taxpayer now relies, as follows (p. 803):

Certainly a part of each payment is going toward the acquisition of this land and to this extent Wilshire Corporation does have an equity.

The discussion concludes with the following (p. 803):

However, even if the Tax Court was correct in holding that Wilshire has not acquired an equity, the alternative ground that they are taking title to the property is sufficient to disqualify the "rental" payments from being treated as a business expense.

Taxpayer now contends that this Court has determined that only a part of each payment is going toward the acquisition of the land, and that accordingly the rest of it must be deductible as rental. It then submits a formula for determining what part is rental, and so deductible.<sup>2</sup> (Br. 5.)

---

<sup>2</sup> Under the formula taxpayer would deduct approximately nine-tenths of each payment. Correspondingly, Mrs. Oesterich would be entitled to capital gains treatment of only about one-tenth.

It is obvious from the foregoing quotations from this Court's opinion that it did not hold that a part of each payment is rental and a part sale price, and that it did not determine the agreement was in part a lease and in part a contract of sale.

Furthermore, even if a part of each payment were to be denominated "rentals" under Section 23(a)(1)(A), taxpayer's cause would not be advanced, since under that section even "rentals" are not deductible if they are for the use of property in which the taxpayer has an equity.

In so far as taxpayer's formula is concerned, taxpayer appears to be arguing that the land was worth only \$75,000 in 1929, that it could not have intended to pay a total of \$679,380 for this land, and, accordingly the parties intended to sell the land for \$75,000. (Br. 5.) This assumption bears with it the assumption that the seller was willing to sell land worth \$75,000, for payments totalling \$75,000, but paid at the rate of about \$1,000 a year for nearly seventy years in the future, surely an unreasonable assumption. More important, the argument that the parties never intended the land to be sold for the total amount to be paid under the contract is foreclosed by this Court's decision that they did agree upon a sale of the land for the contract price.<sup>3</sup> Taxpayer's contentions on this point were repeatedly but unsuccessfully pressed on this Court, and on the Su-

---

<sup>3</sup> In the *Oesterrich* case (p. 803) the Court commented that—

No comparison of the value of the realty and the amount of rental paid at any given time has any validity.

preme Court in its petition for certiorari before the decision in *Commissioner v. Wilshire Holding Corp.*, 244 F. 2d 904, became final.

### CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

CHARLES K. RICE  
*Assistant Attorney General*

LEE A. JACKSON

DAVID O. WALTER  
*Attorneys*  
*Department of Justice*  
*Washington 25, D.C.*

JULY 1958